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Supreme Court, U.S.
FILED
JAN 12 1993
OFFICE OF THE CLERK

No. 92-780

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

**NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,**

*Petitioners,*

v.

**JOSEPH SCHEIDLER, *et al.*,**

*Respondents.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

In opposing certiorari, defendants' five briefs raise a host of arguments and ask this Court to ignore facts in the record. While a 10-page reply cannot possibly deal with all the arguments, we will address the main ones; a few subsidiary issues are discussed in the margin.[1]

## I.

## THE COMPLAINT AND RICO STATEMENT MUST BE TAKEN AS TRUE

Defendants' distortions of the record require a short discussion of the governing procedural law. This case comes under Rule 12(b)(6), Fed.R.Civ.P. Since *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), this Court has held that plaintiffs' allegations must be accepted as true and reasonable inferences drawn in plaintiffs' favor. *Hishon v. King Spaulding*, 467 U.S. 69, 73 (1984), reaffirmed that, "the court may dismiss a complaint only if it is clear that no

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[1] Ryan suggests (without authority) that, despite more than 300 arrests for anti-clinic lawlessness, he cannot be sued as a conspirator in this class action if he did not personally set foot on the class representatives' property. This is not the law. *E.g., Blumenthal v. United States*, 332 U.S. 539 (1947). As to the class issue, we repeatedly moved for certification beginning in 1987, but, at defendants' insistence, the court deferred decision again and again.

Vital-Med Laboratories ("Vital-Med") recasts the case as a unilateral refusal to deal, ignoring the fact that it joined the conspiracy, participated in the unlawful removal of the fetuses, and terminated its services to the clinics *at its co-conspirators' insistence*. In *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1163 (1987), *cert. denied*, 486 U.S. 1005 (1988), Judge Posner explained, "a conspiracy is not less sinister because some of its members are intimidated, rather than bribed, into joining it." Vital-Med also focuses on the wrong market: it is not just pathology services that are being restrained (although that market is highly concentrated). Vital-Med conspired to restrain competition for *pregnancy-related services*, the market defined below.

Terry's discussion of discovery issues only demonstrates how broad and unfocused his discovery requests were.

relief could be granted under any set of facts that could be proved consistent with the allegations." In other cases, the Seventh Circuit has followed this edict. *Hrubec v. National Railroad Passenger Corp.*, 1992 WL 365712 (Dec. 14, 1992), stated:

> A complaint [may] not be dismissed unless no relief may be granted "under any set of facts that could be proved *consistent* with the allegations". . . . A plaintiff need not put all the essential facts in the complaint. He may add them by affidavit or brief—even a brief on appeal. (Emphasis in original).

"The plaintiff is free in defending against a motion to dismiss, to allege without evidentiary support any facts he pleases that are consistent with the complaint, in order to show that there is a state of facts within the scope of the complaint that if proved (a matter for trial), would entitle him to judgment." *Early v. Bankers Life and Casualty Company*, 959 F.2d 75, 79 (7th Cir. 1992). Despite the generous pleading rules, the complaint gave far more detail than the bare notice required.[2] Further, at defendants' request, the court required a RICO Statement; we filed a 107-page document detailing hundreds of predicate acts. R.469. In response to further motions, we provided evidence of Scheidler's personal ties to clinic arson. *See* App. A-3 n.5.[3] Although it was *defendants* who insisted on the RICO Statement, they ask the Court to disregard it. They cite no authority suggesting that it should be ignored and all the caselaw indicates it is a pleading, like an addendum to a complaint. *E.g., Parker & Parsley Petroleum v. Dresser Industries*, 972 F.2d 580, 584 (5th Cir.

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[2] *E.g.*, ¶¶2, 38-78 detail lawless acts, formation of the conspiracy, the names of the perpetrators and its organizational structure; ¶98(a)-(1) details some of the acts of extortion.

[3] Operation Rescue stoops to name-calling ("paranoid," "surreal," "outlandish delusions") to mask both the destructiveness of its conduct and its financial dimension.

1992); *Marriott Bros. v. Gage*, 911 F.2d 1105, 1107 (5th Cir. 1990). This result is in keeping with *Hishon*, *Conley*, *Early*, and *Hrubec*, because a RICO Statement describes a set of facts that could be proven consistent with the complaint. (Thus, it applies to the antitrust defendants, too.) Defendants' argument that the RICO Statement should be ignored is mistaken.

## II.

## THE FIRST AMENDMENT IS NOT IMPLICATED HERE

Several defendants argue infringement of First Amendment rights since, in addition to crimes, some of them engage in lawful speech. Migliorino characterizes her entry by night and removal of fetuses and chaining herself to surgical equipment as "borderline free speech activity." Scheidler advocates riots, forgetting that our nation is based on laws not terrorism.

The complaint focuses on activities *unprotected* by the First Amendment. *See* App. B-3. Defendants' conduct was neither peaceful nor aimed to influence the government. *See* App. D-2, D-3. The First Amendment has never immunized speech that is an integral part of criminal conduct, *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949). *Wilk v. American Medical Association*, 719 F.2d 207, 215 n.6 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984), explained, "that *some* activities of a particular organization are protected by the First Amendment does not shield *all* its activities under *Noerr-Pennington*." Defendants here are in a particularly poor position to invoke the First Amendment because they have disavowed lawful speech and lobbying and have acted directly against their competitors. Such conduct has never been protected.

Scheidler argues that the complaint must be pled with extra specificity but his authorities do not support him. *Franchise Realty Interstate Corp. v. S. F. Loc. Joint*

*Exec. Bd.*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977), held that when a complaint alleged only that defendant's lobbying violated the antitrust laws, it had pled the *Noerr-Pennington* exception, which is not actionable. The complaint here does not allege lobbying. Scheidler's reference to *Herzbrun v. Milwaukee County*, 504 F.2d 1189, 1197 (7th Cir. 1974) (Stevens, J., concurring), is also surprising. Justice Stevens said:

> but our interest in freedom of speech does not justify incurring the cost of committing harmful conduct to go unpunished if that conduct is not even arguably communicative, and is plainly unprotected by the Constitution.

*Id.* at 1197-98. *Herzbrun* held defendant's conduct unprotected even though she called it communicative; *Herzbrun* supports petitioners. As the lower court noted, "the complaint does not allege that defendants have attempted to influence any government actor." App. A-6. Defendants' "avowed purpose" is to shut down clinics, not influence government. App. A-8 n.6.

Scheidler's citation to *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), does not help him either. He claims that *Claiborne* requires that the complaint "allege with precision" the exact conduct that has no First Amendment protection. Brief at 28. But *Claiborne* discusses court judgments, not pleading rules. Even if "precision" were required, the complaint and RICO Statement provide it: they describe vicious criminal and tortious conduct, not speech. Cplt. ¶¶ 2, 38-78, 98(a)-(l); R.469. As *Claiborne* made clear, " 'the use of weapons, gun powder, and gasoline may not constitutionally masquerade under the guise of advocacy.' " 458 U.S. at 916. There are no extra pleading requirements here.

The defendants invoke the name of Dr. Martin Luther King, Jr., but they more closely resemble Orville Faubus, blocking children at the schoolhouse door as they tried to

exercise rights of which Faubus did not approve. The acts sued on here are *not* political and they are *not* speech. Defendants' invocation of the First Amendment only demonstrates their "audacity." App. A-15.

## III.

## THE SEVENTH CIRCUIT'S ECONOMIC MOTIVE REQUIREMENT FOR RICO IS INCONSISTENT WITH THE SECOND AND EIGHTH CIRCUITS' AND SQUARELY CONFLICTS WITH THE THIRD'S

Migliorino argues that the Seventh Circuit, like the Second and Eighth, has required that defendants' RICO acts be "*primarily* directed toward an economic goal." Brief at 4. This *is* what the Seventh Circuit—in error—required; but the Second and Eighth require far less. Indeed, the other defendants acknowledge that the Second and Eighth Circuits require only "some" financial element. That the Seventh Circuit required more is established by the fact that economic benefits and goals are pled.[4]

Some defendants argue that in *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), the Second Circuit required a *primary* economic motive. They ignore *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983), which rejected the reading they offer and held that only "an objective appraisal that some economic purpose was to be accomplished" is needed. *See also United*

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[4] [I]n 1986, PLAL had income over $118,000, and in the same year Scheidler was paid a salary of over $45,000 from PLAL. . . . [T]he former bookkeeper of Operation Rescue testified . . . that in 1989, the organization received income of at least $777,000. . . . Contributions are sent to the RICO Defendants and others for the purpose of supporting these illegal acts. It is well-known that the more outrageous and highly-publicized the activities are, the more likely the RICO Defendants and the enterprises are to receive large donations.

R.469 at 17 n.5, 18, 22.

*States v. Ferguson*, 758 F.2d 843, 853 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985) (*no significant economic purpose* is required). The complaint satisfies the Second Circuit's "some" economic purpose standard.

The result under Eighth Circuit law is the same. Although some defendants rely on *United States v. Flynn*, 852 F.2d 1045 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988), *Flynn* never required motive at all; it merely cited *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981), and found an economic goal was present. *See* 852 F.2d at 1052. *Anderson* mentioned *in dicta* that the enterprise must be directed "toward an economic goal." But *United States v. Clark*, 646 F.2d 1259, 1265 n.11 (8th Cir. 1981), made clear that *Anderson* does *not* limit RICO enterprises to those that exist for "maintaining operations directed toward an economic goal."

Scheidler is disingenuous in saying that *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986), did not discuss economic issues. *Ellison* held that predicate acts need not *benefit* the enterprise but only *affect* it, as by bolstering its members' morale. *Id.* at 950. Here, the predicate acts provide income needed by the enterprises and, as in *Ellison*, bolster morale.

If it had followed the Second or Eighth Circuits, the Seventh Circuit would have sustained the complaint because "some" financial element is "consistent with" the complaint. *See Hishon*, 467 U.S. at 73. But the Seventh Circuit required more; it required, as Migliorino argues, that the defendants' *primary* motive be economic. This conflicts with the Second and Eighth Circuits.

There is no serious question that the Seventh Circuit's opinion squarely conflicts with *Northeast Women's Center v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493

U.S. 901 (1989).[5] Even the Seventh Circuit noted that *McMonagle* and the Second and Eighth Circuit cases conflict. App. A-26. Insofar as the Seventh Circuit claims to be following the Second and Eighth, it inevitably conflicts with the Third. Insofar as it imposes requirements that go beyond the Second and Eighth, it is inconsistent with those Circuits and conflicts even further with the Third.

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[5] Defendants misstate *McMonagle* in claiming it did not discuss whether an economic motive is needed. As Justice White pointed out, dissenting from the denial of a writ of certiorari, the issue was "whether liability under RICO may be imposed where neither the 'enterprise' nor the 'pattern of racketeering activities' had any profit-making element." 493 U.S. 901 (1989). *See also McMonagle*, 868 F.2d at 1349 n.7 ("the defendants claim their activities were completely devoid of economic purpose").

Defendants' many arguments about the Hobbs Act were rejected below, *see* App. A-32 n.17, and deserve only brief mention. Intangible rights are property under the Hobbs Act. *E.g., United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987). Defendants extorted clinics' rights to conduct lawful business, and women's to use their services; these are property rights entitled to protection from fear and threats. *Northeast Women's Center, Inc. v. McMonagle*, 689 F.Supp. 465, 474 (E.D. Pa. 1988), *aff'd.*, 868 F.2d 1342, *cert. denied*, 493 U.S. 901 (1989). Defendants need not receive any benefit from the extortion. *United States v. Green*, 350 U.S. 415, 418-20 (1955). Causing others to give up something of value is sufficient. *See Lewis*, 797 F.2d at 364 n.3. Defendants threaten to commit crimes if clinic personnel and patients do not give up their rights to provide or seek these services. Their acts instill fear in their victims; their announcement that "no clinic will be spared" makes every clinic and patient fear that they may be the next target if they exercise their rights. This is extortion. *See United States v. Duhon*, 565 F.2d 345 (5th Cir.), *cert. denied*, 435 U.S. 952 (1978).

## IV.

## THE CONSPIRACY CAUSED ANTITRUST INJURY, RESTRAINED COMPETITION AND INJURED CONSUMERS

In direct conflict with *Council of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920),[6] the Seventh Circuit held the Sherman Act inapplicable even though the conspiracy aimed to (and did) raise costs and consumer prices, Cplt. ¶ 87, restrained competition and injured consumers. *E.g.*, Cplt. ¶¶ 23-27, 44-45. Defendants vowed to take away business of all pro-choice clinics, which are vitally involved in interstate commerce. Cplt. ¶¶ 23-27. Defendants are their "competitors in commerce"; defendants own and operate businesses that compete for pregnancy-related services, such as pregnancy testing and counseling. Cplt. ¶¶ 2, 11, 13.

Scheidler tries to distinguish *Council*, saying "commercial relationships and activities were directly at issue"; so are they here. Defendants employ "commercial means": they interfere with leases and other contracts and make false appointments and tie up phone lines. Market power (the ability to restrict output or raise prices) is well pled. Cplt. ¶¶ 86, 87. *See United States v. DuPont*, 351 U.S. 377, 391 (1956).

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[6] *Missouri v. NOW*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980), did not limit *Council* as Scheidler claims. *Missouri* reaffirmed *Council* and explained that the fundamental distinction was that *Missouri* involved petitioning and *Council* did not. Ryan's lengthy discussion of antitrust cases overlooks the same distinction: most of his cases involved petitioning or speech, *e.g.*, *Proctor v. General Conference*, 651 F.Supp. 1505 (N.D. Ill. 1986); *Barr v. National Right to Life Committee*, 1981-2 Trade Cos. (CCH) ¶ 64,315 (M.D. Fla. 1981). Others did not involve commerce, *e.g.*, *Swan v. First Church of Christ*, 225 F.2d 745 (9th Cir. 1955). Ryan also misstates *Parker v. Brown*, 317 U.S. 341, 351 (1943), which never suggested that "voluntary associations" are exempt. *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), proves they are not.

Defendants largely abandon the lower courts' analyses and argue that a "non-commercial conspiracy" (whatever that means) is outside the Sherman Act. But they fail to explain 100 years of this Court's teaching that the Act covers "every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which they are clothed." *United States v. American Tobacco Co.*, 221 U.S. 106, 181 (1911). "Unique" claims are not rejected but analyzed to weigh pro-competitive effects against anti-competitive ones. *E.g., NCAA v. Board of Regents*, 468 U.S. 85, 100 n.21 (1984); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975) (Sherman Act is extremely broad, carrying a heavy presumption against exemptions). Even if a conspiracy has "non-commercial" purposes and "non-commercial" members,[7] the Sherman Act applies if it restrains competition. This conspiracy does.

Defendants rely heavily on *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). *Apex* supports petitioners. Noting that in the Sherman Act, "Congress exercised all the power it possessed," and reached every restraint that "involved or affected interstate commerce," *id.* at 495, *Apex* taught that the key to Sherman Act liability is whether the conspiracy is intended to or capable of *affecting competition* as opposed to just one competitor. *Id.* at 511-12. In *Apex*, only a single supplier was affected; this had no impact on competition since other suppliers were not targeted. Here, the conspirators have targeted *all* pro-choice clinics, beginning in the most concentrated geographic markets. Cplt. ¶¶ 6, 26. They threaten not just one supplier, as in *Apex*, but supply itself, as in *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925). Contrary to defendants' suggestion, *Apex* gives no hint that

[7] Non-profit organizations (which most defendants are *not*) are subject to the Act. *Board of Regents*, 468 U.S. at 100 n.22.

a "non-commercial" conspiracy is exempt (*Apex* discussed at length how unions are not exempt, 310 U.S. at 487-88). Both the intent and inevitable effect of defendants' acts are to raise prices to consumers of pregnancy-related services (they have already done so, Cplt. ¶ 87) and eliminate competition. Defendants want only *their* brand of pregnancy-related services to be available. Suppression of competition, monopoly of supply and control of price are precisely their goals. If they succeed, only hospital abortions (at two to five times the price, Cplt. ¶ 8) and clinics like Terry's and Wojnar's will be left.

Defendants argue that the illegality of their acts under state law somehow protects them. They are wrong; illegality is irrelevant (except to establish that the Constitution does not shield them). *Apex*, 310 U.S. at 513. *See also Coronado Coal*, 268 U.S. 295 (1925) (finding liability when union, *inter alia*, vandalized property in effort to restrict supply).

Defendants have targeted competition, not just one or two competitors. They have chosen methods that injure consumers—methods that find no protection in the Constitution. If this Court means what it has said about the scope of the Sherman Act for 100 years, it should grant certiorari and reverse the opinion of the Seventh Circuit.

Respectfully submitted,

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